No 1240

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE MONTANA MINING COMPANY, LIMITED,

Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,

Defendant in Error.

Reply to Supplemental Brief of Plaintiff in Error.

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Assignments of Error XXIII, XXIV and XLIV are directed to Instructions 5, 8 and 11, respectively. It is claimed that by these instructions the court required of plaintiff in error a higher degree of proof respecting certain matters than the law demands.

Instruction 11 (Record, pp. 188-9), was not excepted to in the lower court. The objection now made to Instruction 8 is not the objection contained in the record. Before the jury retired the following exception was taken to Instruction 8: "It is contrary to law, in that no presumption whatever arises with reference to the course of the

discovery vein." (Record p. 205.) In the bill of exceptions other objections to this instruction are stated (Record p. 208), but they do not embrace the objection now made.

The fifth instruction reads as follows:

> "The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a prima facie case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and 133-foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this prima facie case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

It is said that by the use of the word "satisfaction" in this instruction the court required the plaintiff in error to furish a higher degree of proof than the law demands.

In the first place this instruction relates to the issue of title and is wholly immaterial, as this issue was not open for trial, as we have already shown. In the second place when this instruction is construed in connection with the other parts of the charge it will be seen that there is no ground for the criticism made. In the first part of Instruction 5 the court said: "The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages."

In the 14th instruction the court told the jury that the

"burden of proof is upon the plaintiff to show by a preponderance of evidence, its ownership, the amount of ore extracted and its value."

Instruction 25 reads as follows:

> "When you are told in this charge that the burden of proof upon any issue is upon either party to this action, you are to understand that such party must present evidence for your consideration which preponderates over the evidence of the other party upon that issue; and if, after due consideration of all the evidence introduced by the party having the burden of proof, it does not preponderate in his favor, but that the evidence of each party is equal, in your judgment, it is your duty to find such issue against the party having the burden of proof, under these instructions. In determining the weight of the evidence you are not to consider alone the number of witnesses which have been sworn in behalf of either party, but to take into consideration the circumstances under which the evidence was given, the character and standing of the witnesses, their appearance upon the witness stand, and all the circumstances of their evidence, and after such consideration, you are to determine the weight and preponderance of the evidence upon each issue in favor of one or the other of the parties to this suit."

The language of the supreme court of the United States in the opinion in the case of Etna Life Ins. Co. v. Ward, 140 U. S. 76, is applicable to the objection made to Instruction 5. The court said:

> "The most important specification of error in the entire list is as follows: 'The court erred in charging the jury that 'the weight of the testimony must decidedly preponderate on the side of the defendant.' " Objection is particularly made to

> the use of the word 'decidedly' in this connection. The argument is, that the effect of that part of the charge was to direct the jury to return a verdict for the plaintiff, unless the evidence introduced by the defendant to establish its defense should satisfy them, beyond a reasonable doubt, that the defense had been made out. The phrase 'decidedly preponderate' is not technically exact, with respect to the weight and quantity of evidence necessary and proper to justify a verdict in civil cases. If, therefore, this clause of the charge stood isolated from any other part of it bearing upon the same subject matter, there would be serious objection to it. But we think the immediate context, as above quoted, shows that no such meaning can be fairly derived from it as claimed by the defendant. On the contrary, such meaning is excluded in the same sentence, where the jury were told that 'such evidence need not be so convincing as to make the effect beyond reasonable doubt;' and then immediately follows the clause objected to. We think the clause, when taken in connection with the whole tenor and effect of the entire charge, and especially in view of the immediate context, could not have misled the jury in the premises."

The plaintiff in error in its request to instruction No. XXIII (Record p. 219), uses the expression, "unless the plaintiff has *satisfied* you by a preponderance of the evidence." Again, in request No. XXVI (Record p. 220), we find this language: "This is so because the plaintiff must *satisfy* you by a preponderance of the evidence." It is quite evident that the objection now made to Instruction 5 is an after thought, and it is fair to presume that the use of the words "satisfy," "satisfied" and "satisfaction" in the charge was suggested by the plaintiff in error in the

requests for instructions which it made. The words "satisfy," "satisfied" and "satisfaction" are used eleven times throughout the charge. In five instances one or the other of these words is used in referring to the proof required of the defendant in error. (See Instructions 4, 11, 14, 17 and 31.) In Instruction 31 the words "find," "satisfied" and "believe" are all used in the same sense.

In the case of Walker v. Collins, decided by the circuit court of appeals for the Eighth circuit, 59 Fed. Rep. 70, p. 73, Circuit Judge Colville, in the opinion, said:

> "The defendants excepted generally to this charge, and in this court limit the exception to the last clause of the charge, which states that 'it devolves upon him who alleges fraud to show the same by satisfactory proof, i. e., proof to the satisfaction of the jury.' The objection to the charge is that the court should have told the jury that fraud may be established by a preponderance of the evidence, and not that it must be established by 'satisfactory proof, i. e., proof to the satisfaction of the jury.' The charge is taken almost literally from the opinion of the supreme court of the United States in the case of Jones v. Simpson, 116 U. S. 609, 615. In that case the court said: 'It devolves on him who alleges fraud to show the same by satisfactory proof.' * * *
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> "In Bouvier's Law Dictionary (14th Ed.), the term 'satisfactory evidence' is defined to be 'that evidence which is sufficient to produce a belief that the thing is true; in other words it is credible evidence.' The Century Dictionary defines 'satisfactory evidence or sufficient evidence' to be 'such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it is adduced.' No better definition of these terms can be given, and it was in this

sense, presumably, that the jury understood them."

See also:

Treusch v. Ottenburg, 54 Fed. Rep. 867, 877;
Callan v. Hanson, 53 N. W. Rep. (Ia.) 282;
Peletier v. Railroad Co., 88 Wis. 521, 528;
Winston v. Burnell, 44 Kan. 367;
Carstens v. Earls, 26 Wash. 676, 690;
Kenyon v. City, 73 N. W. Rep. (Wis.) 314;
Sams, etc. Co. v. League, 54 Pac. Rep. (Colo.) 642;
Surber v. Mayfield, 60 N. E. Rep. (Ind.) 7.

In the case of Rogers v. Marshall, 1 Wall. 644, it is said:

"A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious and can not mislead the jury."

See also:

Baltimore & P. R. R. Co. v. Mackey, 157 U. S. 86.

Section 3103 of the Code of Civil Procedure of Montana, reads as follows:

"The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty is only required, or that degree of proof which produces conviction in an unprejudiced mind."

Section 3105 provides:

"There are several degrees of evidence:
"1. Primary and secondary.
"2. Direct and indirect.

"3. *Prima facie,* partial, satisfactory, indispensible and conclusive."

Section 3112 provides:

"The evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence."

In *ex parte* Fiske, 113 U. S. 713, after quoting Section 914 of the Revised Statutes, the court said:

"In addition to this, it has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the states prevail in those courts."

See also:

Section 721, Rev. Stat. U. S.

In conclusion we respectfully submit:

1. That Instruction No. 5, relating to the issue of title, is immaterial.

2. It is apparent from the whole charge that the expression "showing to the satisfaction of the jury" has the same import as "showing by a preponderance of the evidence." Instructions 5, 14 and 25 together, the jury were clearly directed to be satisfied by a preponderance of the evidence.

3. The plaintiff in error, by its Requests XXIII and XXVI (Record pp. 219-221), having apparently suggested to the court the use of the words "satisfy," "satisfied" and "satisfaction," should not be heard to complain of the use thereof.

4. The instruction is clearly correct in view of the

definition of satisfactory evidence contained in Section 3112 of the Code of Civil Procedure of Montana.

5. The exception to Instruction 5 was not sufficiently specific to direct the attention of the court to the error now alleged, and for that reason the same should not be considered by this court.

In the opinion in the case of Merchants' Exchange Bank v. McGraw, decided by this court in 76 Fed. Rep. 930, it is said:

> "The national courts have uniformly and repeatedly declared that, in order to be of any avail, the exceptions to the charge of the court, and to other instructions given or refused, or any other rulings of the court, must be taken before the jury retires to deliberate upon their verdict. (Citing numerous cases.) A strict enforcement of this rule is absolutely essential to the proper and intelligent administration of justice. It often serves to correct inaccurate, inadvertent, or misleading expressions in the charge of the court. It affords an opportunity for explanations and qualifications which might otherwise be overlooked. It is not merely formal or technical. It was introduced and should be adhered to, for purposes of justice. *The exceptions, when taken, should be specific and direct, so as to call the attention of the court to the particular point which is claimed to be erroneous.* The practice of allowing counsel to take exceptions to the charge, or instructions, after the jury has retired, except in cases where the charge complained of was given in the absence of counsel, should be discontinued, because the allowance thereof simply incumbers the record, and creates unnecessary expense in the printing of the record and briefs of counsel upon points that will not be considered by the appellate court. The proper practice is to

> inform counsel that, if they desire to take any exceptions to the charge, it must be done before the jury retires."

In this connection attention is called to the fact that the lower court notified the attorneys for the respective parties that any exceptions to the charge should be taken before the jury retired. (Record pp. 199, 200.)

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Under the title "Wilful Trespass," Assignments of Error XXIII, XXIV, XXXVIII, XLIII, XLV, XLVI, and XLVIII, are referred to in the supplemental brief of plaintiff in error. Number XXIII relates to Instruction 5, XXIV to Instruction 8, XLIII to Instruction 9, XLIV to Instruction 14, XLVI to Instruction 15, and XLVIII to the action of the court in refusing to consider the exceptions to the charge presented in the bill of exceptions, and not made until after the trial. Assignment of Error No. XXXVIII is based on request of plaintiff in error No. XXIII.

Instructions 5 and 8 do not relate to the nature of the trespass. The same is true with reference to the request of the plaintiff in error No. XXIII and Instruction 9. There is no exception in the record to either Instructions 14 or 15.

An examination of the charge will disclose that the instructions relating to the nature of the trespass and stating the rules of law by which the jury were to determine whether the trespass was wilful or otherwise, are Instructions 11, 12, 13 and 14. There is no exception to either of these instructions contained in the record. We, there-

fore, submit that the question of the correctness of these instructions is not before this court. We further submit that these instructions are correct.

In the supplemental brief of plaintiff in error it is said that the presumption obtains that the owner of a mining claim is the owner of all that lies within its surface boundaries extended down vertically. Numerous authorities are cited in support of this proposition.

There is no exception to any part of the charge presenting any question regarding such presumption. But, however this may be, the presumption that the plaintiff in error is the owner of the ore in controversy can not obtain in this case, because it was admitted on the trial that the ore was taken from between the 520-foot and 133-foot planes out of a vein or lode which has its apex within the surface boundaries of the St. Louis claim. The court instructed the jury as follows:

> "It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis quartz lode mining claim, between the 520-foot plane and the 133-foot plane, which have been described to you in the evidence." (Record p. 185, instruction 7.)

There was no exception taken to this part of the charge.

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In the supplemental brief of plaintiff in error authorities are cited in support of the statement that the doctrine of the law of the case does not apply to the decision of an intermediate court. This court has so often held that its decision on a former writ of error in the same case is the

law of the case that the question of the controlling effect of the former decisions of this court in the case at bar we do not consider open for discussion.

A number of authorities are cited to the effect that the burden of proof was upon the defendant in error to establish that the trespass was a wilful one. In the first place there is no exception in the record presenting any question regarding the burden of proof as to the nature of the trespass. In the second place, Instruction 14, to which no exception was taken, correctly states the law.

United States v. Homestake Min. Co., 117 Fed. Rep. 481, 486;

St. Clair v. Cash Gold Min. Co., 47 Pac. Rep. 467.

In this connection it should be remembered that it was an admitted fact in the case that the ore was taken from that part of the Drum Lummon vein which has its apex within the surface boundaries of the St. Louis claim.

Respectfully submitted,

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